

EXEMPTIONS/WAIVERS IN MAJOR ENVIRONMENTAL STATUTES

1. National Environmental Policy Act (NEPA)

Emergency Actions: This provision can be invoked when emergency circumstances outside the control of the Agency make it necessary to take an action with significant environmental impact without first complying with pertinent regulations. It requires that the action proponent consult with the Council on Environmental Quality (CEQ) regarding alternative arrangements. Requests for consultation must be submitted to CEQ as soon as the need is identified. The exemption only applies to those aspects of a proposal that must continue on an emergency basis, and only applies to Federal actions with significant environmental impacts. Lesser actions may be subject to agency NEPA procedures. Ordinarily the failure to plan properly does not establish an emergency. 40 CFR § 1506.11.

2. Clean Water Act (CWA)

Presidential Waiver: This provision requires that the action be in the paramount interest of the U.S. It exempts any effluent source, such as a pipe or a vessel, of any Federal agency from compliance with any requirement relating to such source unless they involve the requirements under 33 USC § 1316 (national standards of performance) or §1317 (toxic and pretreatment effluent standards). The waiver is applicable for one year only, but it can be renewed. Congress must be notified in January of waivers granted in the preceding year. 33 USC § 1323 (1251 to 1387).

3. Endangered Species Act (ESA)

National Security Exemption: This provision requires the Endangered Species Committee (committee composed of various Cabinet and sub-cabinet level officials) to exempt DOD from the prohibition against jeopardizing the continued existence of a listed species if the Secretary of Defense finds that an exemption is necessary for reasons of national security. Upon signing the ESA into law, President Carter stated that the Department of Defense should rely on this exemption “only in grave circumstances posing a clear and immediate threat to national security.” 16 USC § 1536(j).

4. Coastal Zone Management Act (CZMA)

Presidential Exemption: This provision requires that there be an appealable judgment, decree or order from a Federal court that a Federal agency action is not consistent to the maximum extent practicable with the enforceable policies of an approved state coastal zone management program. The Secretary of Commerce must certify that mediation will not likely result in

compliance and request that the President exempt from compliance those elements of the proposed action that a court has found to be inconsistent. The President must find that the exemption is in the paramount interest of the U.S. 16 USC § 1456(c)(1)(B).

5. National Historic Preservation Act (NHPA)

Emergency Undertakings: When a Federal agency head determines, under extraordinary circumstances, that there is an imminent threat to the national security such that an emergency action is necessary to the preservation of human life or property, and that such emergency actions would be impeded if the Federal Agency were to concurrently meet its historic preservation responsibilities, the Agency head may immediately waive all or part of its responsibilities under the NHPA for the period of the emergency. The Agency must notify the Secretary of Interior within 10 days of the waiver action. 36 CFR § 78.

6. Marine Mammal Protection Act (MMPA)

Does not contain a provision for waiver or exemption.

7. Noise Control Act

Presidential Exemption: Section 4 of the Noise Control Act authorizes the President to exempt federal agencies from noise control requirements “if he determines it to be in the paramount interest of the United States to do so”. The exemption is valid for not more than one year and notification to Congress is required. 42 U.S.C. § 4903(b).

8. Clean Air Act (CAA)

Presidential Exemption: Section 118 of the Clean Air Act authorizes the President to exempt federal agency sources from compliance with Clean Air Act requirements “if he determines it to be in the paramount interest of the United States to do so”. The exemption is valid for not more than one year and notification to Congress is required. This exemption does not apply to CAA § 411 new source review and special provisions apply to exemptions from CAA § 112 hazardous air pollutants. 42 U.S.C. § 7418(b). (See also CAA §110(f))

9. Resource Conservation and Recovery Act (RCRA)

Presidential Exemption: Section 6001 of the Solid Waste Disposal Act (SWDA) authorizes the President to exempt federal agencies from compliance with RCRA requirements “if he determines it to be in the paramount interest of the United States to do so.” A lack of appropriation cannot be the basis for an exemption unless the President specifically

requested such an appropriation and Congress failed to make it available. The exemption is valid for not more than one year, but the President may grant additional exemptions for periods not to exceed one year if he makes a new determination. The President must notify Congress of the exemption. 42 U.S.C. § 6961(a).

10. Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

EPA Administrator Exemption: Section 18 of FIFRA authorizes the EPA Administrator to exempt, at the Administrator's discretion, any Federal or State agency from compliance if "emergency conditions exist which require such exemption." 7 U.S.C. § 136p.

11. Toxic Substances Control Act (TSCA)

National Defense Waiver: Section 22 of TSCA requires the EPA Administrator to waive compliance with any TSCA provision upon a request and determination by the President that the requested waiver "is necessary in the interest of national defense." 15 U.S.C. § 2621.

12. Prevention of Pollution From Ships (APPS)

The requirements of this statute "do not apply during time of war or a declared national emergency." 33 U.S.C. § 1902(b)(2)(B).